

A **TEKUN CEMERLANG SDN BHD v. VINCI CONSTRUCTION
GRANDS PROJETS SDN BHD**

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
WONG SIONG TUNG JC

[ORIGINATING SUMMONS NO: BKI-24-3-1-2021]

B 31 MARCH 2021

***CIVIL PROCEDURE:** Stay of proceedings – Application for – Application to stay adjudication proceedings – Parties entered contract in Sabah – Whether firm acting and representing client in adjudication proceedings in Sabah was in practice as advocates in Sabah – Whether solicitors appointed authorised persons to act – Whether constitutional and legal to represent in adjudication proceedings – Whether parties free to appoint any representation of choice – Whether there were special circumstances to order stay of adjudication proceedings – Advocates Ordinance Sabah 1953 (Sabah) (Cap 2), ss. 15, 16(1), (2) – Construction Industry Payment and Adjudication Act 2012, s. 8(3)*

The plaintiff was a company having its registered office and business in Kota Kinabalu, Sabah while the defendant was a company having its registered office in Kuala Lumpur. The plaintiff and the defendant had entered into a contract, in Sabah, to carry out construction works. Disputes, however, arose as to the progress claims made by the defendant under the said contract. The defendant, through Messrs Gananathan Loh ('firm') initiated adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). This was followed by the serving of an adjudication claim. The plaintiff then took out the originating summons to stay the adjudication proceedings on the grounds that (i) the adjudication proceeding was a Sabah proceeding; (ii) the solicitors/representatives, the firm appointed by the defendant to act were not authorised persons under s. 15 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) ('Ordinance') and were non-members of the Sabah Bar; (iii) it was unconstitutional, illegal and an offence for the firm to represent the defendant in the adjudication proceedings; and (iv) these were special circumstances for the court to order a stay of the adjudication proceedings initiated by the defendant. The defendant, however, submitted that (i) there was no requirement and/or direction given by the adjudicator to have the adjudication proceedings physically heard, for witnesses to be called and for site visits in Sabah to take place; (ii) the exclusive right of Sabah advocates under the Ordinance was territorial; (iii) since the firm had not performed his task in Sabah, the advocates in the firm appointed were not and could not be 'unauthorised person' under the Ordinance; and (iv) as s. 8(3) of the CIPAA conferred rights to the parties to freely appoint any representation of its choice, by virtue of s. 16(2) of the Ordinance, s. 16(1) had no application to the firm.

Held (allowing application):

- (1) The definition of s. 2 of the Ordinance only expounds the phrase ‘to practise in Sabah’ as those functions and acts that may be performed by the barristers and solicitors in England. It does not delimit or determine the exclusive right of advocates in those functions or acts as may be performed by advocates in their practice under the Ordinance. What amounts to practise as an advocate or did any acts as advocate or nature of things or acts to be done in practice as advocate in Sabah could be inferred from the acts that were prohibited to be carried out by an unauthorised person as set out in s. 16(1) of the Ordinance. The Legislature did not intend the things or acts as set out in s. 16(1) of the Ordinance to be exhaustive having regard to the definition it gave to ‘to practise in Sabah’ under s. 2 of the Ordinance. (paras 30, 32 & 33)
- (2) All the elements necessary, if not substantial, to be put forth to sustain the defendant’s claims in the adjudication proceedings were in or occurred in Sabah. There was no dispute that the relevant contract was made in Sabah. The project works under the contracts which gave rise to the defendant’s claims in the adjudication proceedings were and carried out in Sabah. The adjudicator appointed was in Sabah. The matters were plainly within the territorial jurisdiction of the High Court in Sabah and Sarawak. Any court proceedings as may necessarily arise from the adjudication proceedings and any acts and decisions of the adjudicator appointed, were properly within and subject to the jurisdiction of the courts in Sabah whether High Court or courts subordinate thereto. In the premises, the firm, not being qualified under the Ordinance, was prohibited to practice as advocates or do the acts as they have been as advocates in the adjudication proceedings under s. 15(1) of the Ordinance. (paras 57-60)
- (3) The firm also fell specifically under s. 16(1)(a) of the Ordinance. The phrase ‘in any of the courts of Sabah’ in the said section did not qualify the phrase ‘acts as an advocate or agent for suitors’, therein by applying the rule of last antecedent in interpretation. In so acting as they have been for the defendant in the adjudication proceedings, the firm also fell specifically under s. 16(1)(b) and (c) of the Ordinance. By virtue of s. 16(2) of the Ordinance, s. 16(1) had no application to the appointment of the firm to act or to represent the defendant in the adjudication proceedings. Section 8(3) of the CIPAA does not give a party to the adjudication proceedings a right to appoint whosoever for representation in the adjudication proceedings. It only gives a liberty for a party to choose between self-representation or to be represented by another in the adjudication proceedings. (paras 61-64)

A

B

C

D

E

F

G

H

I

- A (4)** The circumstances of the case warranted the intervention by the court to grant a stay of the adjudication proceedings to enforce the prohibition under the Ordinance against unauthorised persons to practice or to act as advocates in Sabah by representation for a party in the adjudication proceedings in Sabah. (para 90)
- B Case(s) referred to:**
Allen v. Aldridge [1843] 5 Beav 401 (*refd*)
Bar Malaysia v. HF Vitality (Malaysia) Sdn Bhd [2003] 1 CLJ 510 HC (*refd*)
Chase Oyster Bar Pty Ltd v. Hamo Industries Pty Ltd [2010] 272 ALR 750 (*refd*)
Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii [2009] 4 CLJ 449 FC (*refd*)
- C** *Dorchester Hotel Ltd v. Vivid Interiors Ltd* [2009] EWHC 70 (*refd*)
Eastern Countries and London and Blackwall Railway Companies v. Marriage [1860] 9 HLC 32 (*refd*)
Esdaile v. Maclean [1846] 16 LJ Ex 71 (*refd*)
Euroland & Development Sdn Bhd v. Tack Yap Construction (M) Sdn Bhd [2018] 1 LNS 896 HC (*refd*)
- D** *Ideal City Development Sdn Bhd v. PWC Bina Sdn Bhd & Other Appeals* [2019] 2 CLJ 615 CA (*refd*)
In Re Clifford (Deceased); Clifford v. Clifford [1932] NZLR 390 (*refd*)
In the Matter of Baker & Co [1903] 1 KB 189 (*refd*)
Irrawaddy Flotilla Co Ltd v. Bugwandass [1891] LR 18 Ind App 121 (*refd*)
- E** *Liew Piang Voon v. WLT Project Management Sdn Bhd* [2020] 1 LNS 1105 HC (*refd*)
Majlis Peguam Malaysia v. Euro Prestasi & Partners (M) Sdn Bhd [2016] 7 CLJ 102 HC (*refd*)
Mentmore Towers Ltd And Others v. Packman Lucas Ltd [2010] EWHC 457 (TCC) (*refd*)
Michael J Lonsdale (Electrical) Ltd v. Bresco Electrical Services Ltd (In liquidation) and Twintec Ltd v. Volkerfitzpatrick Ltd [2014] EWHC 10 (TCC) (*refd*)
- F** *Probuild Constructions (Aust) Pty Ltd v. Shade Systems Pty Ltd & Anor* [2018] 351 ALR 225 (*refd*)
R v. Campbell & Anor [1974] 45 DLR (3d) 522 (*refd*)
R v. Reid [1931] SSLR 62 (*refd*)
R (Smith) v. Mitchell [1932] OWN 508 (*refd*)
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC (*refd*)
- G** *Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129 FC (*refd*)
Re Sanderson [1927] VLR 394 (*refd*)
Samsuri Baharuddin & Ors v. Mohamed Azahari Matiasin & Another Appeal [2017] 3 CLJ 287 FC (*refd*)
- H** *Turner (East Asia) Pte Ltd v. Builders Federal (Hong Kong) Ltd & Anor* [1988] 1 LNS 12 HC (*refd*)
View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC (*refd*)
Way v. Bishop [1928] 1 Ch 647 (*refd*)
Zublin Muhibbah Joint Venture v. Government Of Malaysia [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371 HC (*refd*)
- I**

Legislation referred to:

Advocates Ordinance Sabah 1953 (Sabah) (Cap 2), ss. 2, 6, 7, 9, 8(1), (2), 15(1), 16(1)(a), (b), (c), (d), (e), (f), (g), (h), (2)
Construction Industry Payment and Adjudication Act 2012, ss. 8(3), 15, 16
Courts of Judicature Act 1964, ss. 25, 35
Rules of Court 2012, O. 59 r. 7

Legal Profession Act [Sing], ss. 29(1), 30(1), (2)

Other source(s) referred to:

Halsbury's Laws of Malaysia – Administrative Law – paras 80.050 & 80.051

For the plaintiff - Roger Chin; *M/s Chin Lau Wong & Foo*

For the defendant - PK Lim; *M/s PK Lim & Co*

Reported by Lina E

JUDGMENT**Wong Siong Tung JC:****Introduction**

[1] The plaintiff is a company having its registered office and business in Kota Kinabalu, Sabah and whereas, the defendant is a company having its registered office in Kuala Lumpur.

[2] Sometime in June 2019, the plaintiff and the defendant entered into a contract contained in various documents in writing whereby the plaintiff appointed and engaged the defendant to carry out the construction of a project works known as “the proposed development of 27 units of Resort Villas (Phase 1 A) on part of CL 045329048 at Pantai Dalit, Tuaran, Sabah” (hereinafter referred to as “the said project works”) for the sum of RM51,189,353.37.

[3] Towards the end of 2019, disputes arose between the parties relating to the progress claims made by the defendant under the contract.

[4] After the defendant through the firm of Messrs Gananathan Loh served payment claim for RM3,634,824.14 and failure of any payment response served by the plaintiff, the defendant initiated adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) by a notice of adjudication issued by Messrs Gananathan Loh.

[5] In due course, the Director of Asian International Arbitration Centre (AIAC) (formerly known as Kuala Lumpur Regional Centre For Arbitration (KLRCA)) appointed Ms Catherine Chau Siew Ping of Messrs Catherine Chau & Associates in Kota Kinabalu, Sabah as the adjudicator under reference No. AIAC/D/ADJ-3479-2020.

A [6] The said adjudicator gave her notice dated 17 December 2020 of her acceptance of the appointment to act as the adjudicator in the matter and also gave her Direction No. 1 pertaining to the time for service of the defendant's adjudication claim, of the plaintiff's adjudication response and of the defendant's adjudication reply on the other party.

B [7] Pursuant to the said directions as given, the defendant by Messrs Gananathan Loh served on the plaintiff an adjudication claim dated 5 January 2021.

The Application Of The Applicant

C [8] On 8 January 2021, the applicant/plaintiff took out the originating summons herein (which was amended as ordered by the court on 13 January 2021 (ie, encl. 9)) to stay the said adjudication proceedings under reference No. AIAC/D/ADJ-3479-2020.

D [9] The grounds of the application are that the adjudication proceeding is a Sabah proceeding for which the solicitors/representatives, Messrs Gananathan Loh appointed by the defendant to act therein are not authorised persons under s. 15 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2), are non-members of the Sabah Bar and that it is illegal and an offence for Messrs Gananathan Loh to represent the defendant in the adjudication proceedings.

Submission And Contentions Of The Applicant/Plaintiff

F [10] The plaintiff's counsel submitted that under s. 25 and/or s. 35 of the Courts of Judicature Act 1964, the court has a discretion to grant or refuse a stay of the adjudication proceedings initiated by the defendant under CIPAA.

[11] He submitted that the adjudication proceedings so initiated by the defendant is a Sabah proceeding.

G [12] He contended that Sabah advocates have exclusive right to their legal practice in cases arising in Sabah "in and outside" courts and that this is the constitutional right of Sabah advocates.

H [13] The plaintiff's counsel submitted that Messrs Gananathan Loh are unauthorised persons under s. 15 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) ("said Ordinance") as none of the advocates in the said firm appointed to represent the defendant in the adjudication proceedings is on the Roll of Sabah Advocates and has a valid certificate to practice.

I [14] He submitted it is not only unconstitutional but also illegal for Messrs Gananathan Loh to commence an adjudication proceeding having regards to s. 16(1)(a) and (d) of the said Ordinance.

[15] He submitted that the court should not allow an unconstitutional and illegal act. He contended that these are the special circumstances for the court to order a stay of the adjudication proceeding initiated by the defendant by Messrs Gananathan Loh.

A

Submission And Contentions Of The Applicant/Plaintiff

[16] Defendant's counsel however submitted that there was no requirement and/or direction given by the adjudicator in this case to have the adjudication proceedings physically heard, for witnesses to be called and for site visits in Sabah to take place.

B

[17] Defendant's counsel submitted that the exclusive right of Sabah advocates under Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) is territorial.

C

[18] He submitted that since Messrs Gananathan Loh as appointed by the defendant in the adjudication proceeding has not performed his task in Sabah, the advocates in the said firm appointed are not and cannot be "unauthorised person" under the Advocates Ordinance (Sabah) (Cap 2).

D

[19] Defendant's counsel submitted that as s. 8(3) of the CIPAA confers rights to the parties to freely appoint any representation of its choice, therefore by virtue of s. 16(2) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2), s. 16(1) therein has no application to Messrs Gananathan Loh appointed to act or represent the defendant in the adjudication proceeding.

E

Relevant Legislation, Analysis And Findings

[20] There is no dispute between the parties that the advocates in the firm of Messrs Gananathan Loh appointed to act or represent the defendant in the adjudicating proceedings are not advocates admitted and enrolled as advocates under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2).

F

[21] By s. 8(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2), persons admitted under s. 6 and enrolled under s. 7 as advocates thereunder have "the exclusive right **to practise in Sabah and to appear and plead in the Federal Court or Court of Appeal** when sitting in Sabah or when sitting in any other part of Malaysia hearing a cause or matter originating from the High Court or any subordinate court in Sabah and **in the High Court and in all courts in Sabah subordinate thereto** in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation".
(emphasis added)

G

H

[22] This is subject to the provisos therein and exceptions as enumerated in s. 8(2) which is not necessary for me to set out as they have no application to the case.

I

- A [23] The exclusive right under s. 8(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) is in respect of practising in the State of Sabah and appearing and pleading in the different levels of the court system.
- [24] Section 15 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) provides that:
- B Unauthorised person.
15. (1) Subject to the provisions of this Ordinance, no person shall **practise as an advocate** or do any act **as an advocate** unless his name is on the roll and he has a valid certificate to practise authorising him to do the act.
- C (2) For the purposes of this Ordinance, a person who does not fulfil the requirements in subsection (1) is referred to in this Ordinance as an “unauthorised person”. (emphasis added)
- D [25] The section prohibits any person practising as an advocate or doing any act as advocate without being enrolled as an advocate and possessed a valid certificate to practise issued under s. 9 therein. Such person so prohibited is defined as “unauthorised person”.
- E [26] Then, s. 16 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) specifies the acts or things done by an unauthorised person that would constitute offence and those would not.
- Offences.
16. (1) Any unauthorised person who:
- F (a) **acts as an advocate or agent for suitors**, or who as such advocate sues out any writ or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person or in his own name in any of the courts of Sabah, or draws or prepares any instrument relating to any proceedings in any of the courts of Sabah;
- G (b) wilfully and falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified **to act as, an advocate**, or that he is recognised by law as so qualified;
- (c) either directly or indirectly for or in expectation of any fee, gain or reward, draws or prepares any instrument **relating to immovable or movable property**;
- H (d) appears before the Industrial Court, Arbitration Tribunal, Court Martial or the Disciplinary Board set up pursuant to this Ordinance **in a case or matter arising from Sabah**;
- I (e) either directly or indirectly for or in expectation of any fee, gain or reward, draws or prepares any instrument relating to immovable property and any memorandum or other documents for the purposes of registration under the Land Ordinance [Sabah Cap. 68]

- or any other written law relating to registration of documents or makes any application or lodges any document for registration under the said Land Ordinance or any other written law relating to registration of documents at the Central Land Office or at any District Land Office; A
- (f) on behalf of a claimant or person alleging himself to have a claim to a legal right, writes, publishes or **sends a letter or notice threatening legal proceedings other than a letter or notice that the matter will be handed to an advocate for legal proceedings;** B
- (g) takes instructions or draws or prepares any document for the purposes of applying for or opposing a grant of probate or letter of administration; or C
- (h) solicits the right to negotiate, or negotiates in any way for the settlement of, or settles any claim arising out of personal injury or death and founded upon a legal right or otherwise,
- commits an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both. D
- (2) Nothing in s. 8 or in subsection (1) of this section shall prevent any litigant in person or any person having a right to appear under any rules of court or any other written law **for the time being in force** from attending, pleading and doing any act with regard to any proceeding in which he is a litigant in person, **or in which he has a right to appear.** E
- (3) The provisions of this section shall not apply to:
- (a) the Attorney-General of the Federation, any State Attorney-General, State Advocate-General or Legal Adviser of a State, or any person acting under the authority of any of them; F
- (b) any public officer drawing or preparing instruments in the course of his duty;
- (c) any person employed merely to engross any instrument or proceeding, G
- (d) any person who draws or prepares for a fee or reward:
- (i) a will or other testamentary instrument;
- (ii) an agreement under hand only;
- (iii) a letter or power of attorney; H
- (iv) a transfer of stock containing no trust or limitation thereof;
- (e) any person who, on behalf of an illiterate:
- (i) writes a petition or letter addressed to or intended to come to the notice of any public officer or Court; or I
- (ii) completes any document or form prescribed by any Ordinance;

- A (f) the Public Trustee, Official Assignee, Official Receiver, Assistant Public Trustees, Assistant Official Assignees and Assistant Official Receivers acting in the course of their duties under any law relating to their offices;
- B (g) any person acting personally for himself only in any matter or proceedings to which he is a party or acting solely for a company or organization which he serves as a full-time paid employee in any matter or proceedings in which the company or organization is a party, but such person shall have no right to represent the company or organization in Court or in Chambers or attest documents for the company or organization which is required to be attested by an advocate;
- C (h) any *bona fide* and full-time employee of an insurance company negotiating for the settlement of or settling a claim made or contemplated against any person or body corporate in cases where the claim arising out of personal injury or death relates to a risk insured by that insurance company;
- D (i) **an arbitrator or umpire lawfully acting under any written law relating to arbitration, settling or attempting to settle the dispute between the parties to the arbitration;**
- E (j) any full-time member of the academic staff of the Faculty of Law of the University of Malaya or other universities in Malaysia **acting solely in an advisory capacity upon instructions from a practising advocate;**
- (k) any accountant drawing or preparing documents in the exercise of his profession;
- F (l) any agent duly authorised to the satisfaction of the Registrar of Trade Marks drawing or preparing documents in any matter relating to trade marks; and
- (m) any full-time employee of an advocate drawing or preparing any document under the authority of a practising advocate and for the purposes of his employer. (emphasis added)
- G

[27] Section 2 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) defines “to practise in Sabah” meaning to perform in Sabah the following:

- (a) any of the functions which in England may be performed by a member of the Bar as such;
- H (b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such; or
- (c) any of the functions authorized under this Ordinance;

I [28] In *Samsuri Baharuddin & Ors v. Mohamed Azahari Matiasin & Another Appeal* [2017] 3 CLJ 287; [2017] 2 MLJ 141, the Federal Court held that the definition of the phrase “to practise in Sabah” under s. 2 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) which appears in the first limb of

s. 8(1), means to perform any of the functions that may be performed by the barristers and solicitors in England regardless of whether those functions are exclusive or non-exclusive. A

[29] The Federal Court held that exclusivity or non-exclusivity is never part of the definition and exclusivity and functions are two separate issues. The Federal Court held that exclusivity does not in itself form part of the function to be performed. B

[30] That being the case, the definition in s. 2 of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) only expounds the phrase “to practise in Sabah” as those functions and acts that may be performed by the barristers and solicitors in England. It does not de-limit or determine the exclusive right of advocates in those functions or acts as may be performed by advocates in their practice under the Ordinance. C

[31] Were Messrs Gananathan Loh engaged in practice as an advocate in Sabah or did any acts as advocates in Sabah by being appointed and representing the defendant in the adjudicating proceedings? D

[32] What amounts to practice as an advocate or did any acts as advocate or nature of things or acts to be done to be in practice as advocate in Sabah can be inferred from the acts that were prohibited to be carried out by an unauthorised person as set out in s. 16(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2). E

[33] I do not think the Legislature intended the things or acts as set out in the s. 16(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) to be exhaustive having regards to the definition it gave to “to practice in Sabah” under s. 2 of the said Ordinance. F

[34] The functions or things or works the barristers and solicitors in England in their practice they may carry out cannot remain static. Their functions or things or works carried out in their practice change by the advancing time with the advent of new technologies, new inventions, methods of doing things, new legislations, requirements and methods of resolving disputes. So are the advocates carrying out their practice in Sabah and everywhere in the world. G

[35] In *Turner (East Asia) Pte Ltd v. Builders Federal (Hong Kong) Ltd & Anor* [1988] 1 LNS 12; [1988] 2 MLJ 280, the issue is whether the foreign lawyers from an American law firm acting for the respondents in an arbitration proceeding between a respondent and applicant in Singapore amounted to “practice as an advocate and solicitor or do any act as an advocate or solicitor” under s. 29(1) of the Legal Profession Act in force in Singapore so as to be prohibited by s. 30(1) thereunder. H
I

- A [36] Similar to s. 16(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2), s. 30(2) of the Legal Profession Act in question also provided a list of the acts and things that an unauthorised person was prohibited from carried out. Though the section did not specifically state that representing parties in arbitration proceedings by an unauthorised person is prohibited,
- B the court in that case nevertheless held that the representation of the foreign lawyers for the respondent in the arbitration proceedings in Singapore amounted to “practice as an advocate and solicitor or do any act as an advocate or solicitor” under s. 29(1) of the Legal Profession Act and also “acts as an advocates or a solicitor or agent for any party to proceedings”
- C under s. 30(1) of the said Act and would contravene the provisions.

[37] In that case, after referring to the cases of *Re Sanderson* [1927] VLR 394; *R v. Reid* [1931] SSLR 62; *R (Smith) v. Mitchell* [1932] OWN 508; and *R v. Campbell & Anor* [1974] 45 DLR (3d) 522, Chan Sek Keong JC stated at p. 284 that:

- D On the basis of these decisions, counsel for the applicants submitted that whether a person is acting as an advocate or solicitor or doing an act as such **depends on the circumstances of each case. I agree.** It is neither necessary nor desirable to attempt to identify the acts and services which have the quality or character of being “legal” acts or services or which may only be provided by advocates and solicitors. The character of a legal
- E service is not determined solely by the requirement of knowledge of the law, for non-advocates and solicitors may have a knowledge of the law and many of them have a better knowledge. **The categories of legal services are not closed nor do they remain static for all time.** They change from time to time to meet the needs of society. New services are developed to meet the demands of political, economic and social changes
- F in Singapore. Such changes also result in traditional legal services dying out as the need for them dies out. Some services are captured by other disciplines because their practitioners are better placed or equipped to provide them in Singapore. A good example is tax planning and advice which is predominantly provided by the accountancy profession.
- G (emphasis added)

After considering the case of *In the Matter of Baker & Co* [1903] 1 KB 189 and *Allen v. Aldridge* [1843] 5 Beav 401; 49 ER 633, His Lordship further held that:

- H In my view, two tests may be constructed from these authorities and the provisions of sections 29 and 30 of the Act:
- (a) other than those specific acts listed in section 30(1) and (2), **an act is an act of an advocate and solicitor when it is customarily (whether by history or tradition) within his exclusive function to provide,** e.g. giving advice on legal rights and obligations, drafting contracts and pleadings and pleading in a court of law;
- I (b) a person acts as an advocate and/or solicitor if, **by reason of his being an advocate and solicitor, he is employed to act as such in any matter connected with his profession.** (emphasis added)

[38] In *Samsuri Baharuddin & Ors v. Mohamed Azahari Matiasin & Another Appeal* [2017] 3 CLJ 287; [2017] 2 MLJ 141 the Federal Court upheld the ruling of the High Court that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) are prohibited by the same from representing parties to arbitration proceedings in Sabah.

A

B

[39] It is to be noted that the Federal Court decision was delivered on 19 January 2017, at a time when s. 16(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) has yet to be amended by the Advocates Ordinance (Sabah) (Amendment) Act 2017. The said amending Act came in to force on 1 July 2017 (except s. 23), PU(B) 294/2017) and inserted a provision specifically prohibiting an unauthorised person to appear before an arbitration tribunal as in the para. (d). The said amending Act also inserted new paras. (d), (e), (f), (g) and (h) under s. 16(1) as they are in force at present.

C

[40] In that case the Federal Court nevertheless held that an unauthorised person was prohibited from representing parties in arbitration proceedings in Sabah notwithstanding that s. 16(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) had no specific provision which at that time prohibited an unauthorised person for such representation in respect of arbitration proceedings.

D

[41] The Federal Court in so ruling, has not regarded the things or acts as set out in the s. 16(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) then which an authorised person was prohibited to perform or only an authorised person may carry out to be exhaustive. In other words, the Federal Court has not regarded the categories of the legal service (acts or things to be done to constitute “to practise or act as advocate”) as closed and to remain static all the time.

E

F

[42] This is consistent with the decision in *Turner (East Asia) Pte Ltd v. Builders Federal (Hong Kong) Ltd & Anor* [1988] 1 LNS 12; [1988] 2 MLJ 280.

[43] I am mindful of the High Court decision in *Zublin Muhibbah Joint Venture v. Government Of Malaysia* [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371; [1990] 3 MLJ 125 which is directly in contradiction to the decision in *Turner (East Asia) Pte Ltd v. Builders Federal (Hong Kong) Ltd & Anor* [1988] 1 LNS 12; [1988] 2 MLJ 280.

G

[44] However, the Federal Court in *Samsuri Baharuddin & Ors v. Mohamed Azahari Matiasin & Another Appeal* [2017] 3 CLJ 287; [2017] 2 MLJ 141 (at para. 26) has considered the decision in *Zublin Muhibbah Joint Venture v. Government Of Malaysia* [1990] 2 CLJ 112; [1990] 3 CLJ (Rep) 371; [1990] 3 MLJ 125. The Federal Court has neither followed the decision in that case nor expressly approved it.

H

I

- A [45] In *Way v. Bishop* [1928] 1 Ch 647, the issue was whether a retired partner from a law firm was in breach of a restrictive covenant in a contract of partnership “not to practise” as a solicitor for a period after retirement within a certain area, when he took up employment as a solicitor's managing clerk in the area concerned. It was held that by merely acting as a managing clerk to another solicitor, the retired partner was not practising as solicitor although he himself was a solicitor and in a position to practise as such.

[46] In that case, Lawrence LJ stated at p. 658 that:

- C If a managing clerk holds a certificate which entitles him to practise, it may be difficult under certain circumstances to ascertain whether he is himself practising as a solicitor or not; **but I think the test in every case must be whether in the work he is doing the relation of solicitor and client is constituted between him and the client for whom he is acting.** Applying that test to the present case, the evidence shows that the defendant has not hitherto practised as a solicitor, and I do not find any evidence that he threatens or intends so to practise in the future. He is now acting merely in the capacity of managing clerk to a practicing solicitor, and as such the legal work which he is doing is work done for and on behalf of his employer ... (emphasis added)

Russell LJ said at p. 660 that:

- E In my opinion, the natural meaning of the words “practising as a solicitor” is **acting as a solicitor in such circumstances as that the relation of solicitor and client will arise as between the covenantor and the persons whose affairs he is transacting.** In my opinion, the phrase “practising as a solicitor” **connotes a person who is a principal; it connotes a person who has clients:** it connotes a person, in short, who has a practice, and the words are not apt to describe the position of a person who is acting as the servant of another who is practising as a solicitor.

(emphasis added)

- G (See also: *Bar Malaysia v. HF Vitality (Malaysia) Sdn Bhd* [2003] 1 CLJ 510; [2003] 5 MLJ 145 and *Majlis Peguam Malaysia v. Euro Prestasi & Partners (M) Sdn Bhd* [2016] 7 CLJ 102; [2015] MLJU 2055).

Practise Or Act As Advocates In Sabah

- H [47] Considering the nature of claims of the defendant in the adjudication proceedings, apart involving the technical assessment of the construction works allegedly carried out and assessment of the value thereof requiring skills of the professions such as architects, engineers and quantity surveyors in the building construction, they also require legal knowledge and advice in respect of the application and effect of the provisions of the contract made between parties relating to the legal rights and obligations thereunder and also the knowledge and if not, advice on legal requirements under the provisions of the CIPAA which functions, advocates customarily and habitually were providing.

[48] The defendant admitted that it has through its solicitors, Messrs Gananathan Loh served the plaintiff in Kota Kinabalu, Sabah, on 20 October 2020, the required payment claim under CIPAA (see: para. 7 and exh. “JP2” of encl. 13).

A

[49] The defendant has also by Messrs Gananathan Loh as its solicitors issued the required notice of adjudication under CIPAA and served it on the plaintiff on 17 November 2020 (see para. 8 and exh. “JP3” of encl. 13).

B

[50] By the adjudication claim (Form 7) dated 5 January 2021 (exh. TCSB1 of encl. 2) prepared and submitted by Messrs Gananathan Loh to the adjudicator, Messrs Gananathan Loh are expressly and clearly holding up themselves as the advocates representing the defendant in the adjudication proceedings.

C

[51] It signifies that Messrs Gananathan Loh have been acting as the advocates with the defendant as their client in the adjudication proceedings. It cannot be said that Messrs Gananathan Loh have been acting merely as servant of the defendant in the adjudication proceeding.

D

[52] It cannot be said that it is on the basis of a relationship with the defendant other than that of solicitors and clients that Messrs Gananathan Loh have been representing and acting on behalf of the defendant in the adjudication proceedings.

E

[53] It is not suggested that Messrs Gananathan Loh are not charging any fee or charges of any kinds for so acting.

[54] In the premises, I hold that Messrs Gananathan Loh are indeed practicing as advocates or have prepared and submitted the adjudication claim as advocates on behalf of the defendant in the adjudication proceedings within the definition of “practise as an advocate or do any act as an advocate” under s. 15(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2).

F

[55] Have Messrs Gananathan Loh been practicing in Sabah by preparing and submitting the adjudication claim for the defendant to the adjudicator and by continuing to hold themselves as acting as advocates for the defendant in the adjudication proceedings?

G

[56] I am of the view that they have been practising in Sabah in the adjudication proceedings for the purpose of Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) even though the defendant’s business office is in Kuala Lumpur and Messrs Gananathan Loh may have prepared the documentations for the adjudication proceedings in Kuala Lumpur.

H

[57] This is because all the elements necessary, if not substantially to be put forth to sustain the defendant’s claims in the adjudication proceedings are in or occurred in Sabah. There is no dispute that the relevant contract between

I

- A the plaintiff and defendant was made in Sabah. The project works under the contract between the parties which give rise to the claims of the defendant in the adjudication proceedings were and carried out in Sabah. The adjudicator appointed is in Sabah.
- B [58] The matters are plainly within the territorial jurisdiction of the High Court in Sabah and Sarawak with its branch in Kota Kinabalu, Sabah.
- C [59] Any court proceedings as may necessary arise from the adjudication proceedings and any acts and decisions of the adjudicator appointed are properly within and subject to the jurisdiction of the courts in Sabah whether High Court or courts subordinate thereto.
- D [60] In the premises, Messrs Gananathan Loh, the firm of advocates and solicitors in Kuala Lumpur not being qualified under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) are prohibited to practise as advocates or do the acts as they have been as advocates in the adjudication proceedings under s. 15(1) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2).
- E [61] Further, Messrs Gananathan Loh also fall specifically under s. 16(1)(a) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2). I am of the view that the phrase “in any of the courts of Sabah” in the said section does not qualify the earlier phrase “acts as an advocate or agent for suitors” therein by applying “the rule of last antecedent” in interpretation. (See: *Eastern Countries and London and Blackwall Railway Companies v. Marriage* [1860] 9 HLC 32; 11 ER 639 at p. 641; *Irrawaddy Flotilla Co Ltd v. Bugwandass* [1891] LR 18 Ind App 121 (PC); *Esdaille v. Maclean* [1846] 16 LJ Ex 71; 15 M & W 277; 153 ER 854; and *In Re Clifford (Deceased)*; *Clifford v. Clifford* [1932] NZLR 390).
- F [62] In my view, in so acting as they have been for the defendant in the adjudication proceedings, Messrs Gananathan Loh also fall specifically under s. 16(1)(b) and 16(1)(c) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2).
- G [63] In respect of the submission of counsel for the defendant that as s. 8(3) of the CIPAA confers rights to the parties to freely appoint any representation of its choice in the adjudication proceedings, by virtue of s. 16(2) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2), s. 16(1) has no application to appointment of Messrs Gananathan Loh to act or to represent the defendant in the adjudication proceedings, s. 8 of the CIPAA is set out as follows:
- H
- Initiation of adjudication
- I (1) A claimant may initiate adjudication proceedings by serving a written notice of adjudication containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.

- (2) Upon receipt by the respondent of the notice of adjudication, an adjudicator shall be appointed in the manner described in s. 21.
- (3) **A party** to the adjudication proceedings **may** represent himself or be represented by any representative appointed by the party.
(emphasis added)

A

[64] I do not think s. 8(3) of the CIPAA gives a party to the adjudication proceedings a right to appoint whosoever for representation in the adjudication proceedings. It only gives a liberty for a party to choose between self-representation or to be represented by another in the adjudication proceedings.

B

[65] It does not give a party to the adjudication proceedings, a right to representation by another person which is prohibited by laws. It does not go that far.

C

[66] It certainly does not give Messrs Gananathan Loh the “right” within the meaning in s. 16(2) of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) to represent and act as advocates for the defendant in the adjudication proceedings in Sabah in abrogation of the right as conferred upon the advocates under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2).

D

[67] Further, though the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) was declared Federal Law *vide* LN 199/65 or *vide* FLN 435/65, any Act of Parliament removing or altering the right to practice of advocates thereunder cannot come into operation until adopted by the State of Sabah by an enactment of its Legislature. (See: *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato’ Ting Check Sii* [2009] 4 CLJ 449; [2009] 4 MLJ 165)

E

[68] I must make it clear that I am not holding that other professions in building construction such as the architects, engineers, quantity surveyors or any non-professionals who have the technical skills in the matters concerning building construction and also legal knowledge but “unauthorised” under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) must necessarily be in practice as advocates or acted as advocates when they represent a party in adjudication proceedings and that the prohibitions in Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) necessarily applied to them so representing a party in an adjudication proceedings. It is not an issue necessary for determination in this case.

F

G

[69] The issue in this case is solely whether Messrs Gananathan Loh by acting and representing the defendant in the adjudication proceedings have been in the practice as advocates in Sabah which is prohibited by the provisions of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2). I hold that they have been and are prohibited.

H

I

A [70] Thus, no view is formed and no determination is made as to whether advocates under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) have the right to represent or act for parties in adjudication proceedings to the exclusion of persons of other professions, such as architects, engineers, or quantity surveyors.

B **Court Jurisdiction To Order Stay**

C [71] The High Court being the superior court possesses supervisory jurisdiction over inferior tribunals such as adjudication tribunals under CIPAA so as to keep them within the bound of their authority and jurisdiction by prohibiting the progress of the adjudication proceedings. (See: *Halsbury's Laws of Malaysia – Administrative Law* – paras. 80.050 and 80.051; *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; and *Chase Oyster Bar Pty Ltd v. Hamo Industries Pty Ltd* [2010] 272 ALR 750. As to the scope of judicial review of the decision of the adjudicator, see: *Probuild Constructions (Aust) Pty Ltd v. Shade Systems Pty Ltd & Anor* [2018] 351 ALR 225).

E [72] Though ss. 15 and 16 of the CIPAA provide for the setting aside and stay respectively of adjudication decision, there is no provision which ousts the supervisory role and jurisdiction of the High Court to intervene to set aside or to prohibit an adjudication proceeding by an order of stay or injunction on the ground that the adjudicator has no jurisdiction to enter upon the adjudication.

F [73] In *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22, the Federal Court decided that a challenge to jurisdiction of an adjudicator appointed under CIPAA could be made at any time and not only upon an application to set aside an adjudication award under s. 15 of the CIPAA after conclusion of the adjudication proceedings. (see: *Dorchester Hotel Ltd v. Vivid Interiors Ltd* [2009] EWHC 70; *Euroland & Development Sdn Bhd v. Tack Yap Construction (M) Sdn Bhd* [2018] 1 LNS 896; [2018] MLJU 861; and *Liew Piang Voon v. WLT Project Management Sdn Bhd* [2020] 1 LNS 1105; [2020] MLJU 1431).

H [74] What remains to be determined is whether this court should exercise its supervisory jurisdiction to intervene and to restrain the progress of the adjudication proceedings by granting a stay to enforce the prohibition of the representation of the defendant by Messrs Gananathan Loh.

I [75] In *Euroland & Development Sdn Bhd v. Tack Yap Construction (M) Sdn Bhd* [2018] 1 LNS 896; [2018] MLJU 861, it was held that court would intervene in staying an adjudication proceeding when it could be established to be plain and obvious that the adjudicator lacked the jurisdiction (the core or original jurisdiction and not in the administrative or public law sense of making a wrong finding whether of law and facts which a tribunal is entrusted to make that would render the tribunal in excess of jurisdiction) or no

jurisdiction at all to begin with or enter upon the adjudication due to non-compliance with the statutory requirements that conferred the jurisdiction.

A

[76] In that case, the court recognised that “there are certain categories of clear cases of an absolute lack of jurisdiction where to allow the claimant to proceed with the statutory adjudication would be a sheer waste of time only to have it later declared that that the whole adjudication proceeding and the adjudication decision is null and void for absolute lack of original or core jurisdiction”.

B

[77] In that case Justice Lee Swee Seng held that:

C

[41] *Similarly in a case that warrants a stay of the Adjudication Proceeding on ground that based on the facts as disclosed on the Payment Claim or even taking into consideration the facts as disclosed in the Adjudication Claim if that has been served already, this Court is not fettered from granting the declaration and injunction sought to stay the Adjudication Proceeding in a case that merits it, having in mind the intention of Parliament as expressed in s. 27(3) of the CIPAA.*

D

[42] One can imagine a clear-cut case where the contract is one addressed in s. 2 of the CIPAA where its application to is conferred and covered and under s. 3 where its exemption and exclusion is spelt out. To insist on proceeding with Adjudication on a contract that is clearly pure oral or a construction of a double-story residential bungalow house would be a sheer waste of time and money.

E

[43] In a case where there is no jurisdiction to begin with rather than one where there is jurisdiction but that the Adjudicator has exceeded his jurisdiction, the Court is perfectly positioned and has the power to allow a determination to be made first before the Adjudication in a case that warrants it and even to allow an injunction to stay the Adjudication Proceeding.

F

[44] However Parliament’s intention is clear in that there would be some jurisdictional challenges that may involve convoluted facts combined with no less complicated questions of law to consider. The intention of Parliament under s. 27(3) of the CIPAA is clearly not to ruffle and trouble the Adjudicator with such difficult questions of mixed fact and law where jurisdiction is concerned, but to allow him to proceed as if he has jurisdiction and to hear the parties on the dispute and to make his finding of facts on the dispute and determine if there is any sums owing for work done or services rendered as claimed, taking into consideration the defenses and set-offs and then without prejudice to the rights of the party unhappy with the issue of jurisdiction, to allow that dissatisfied party to raise the jurisdictional challenge in the High Court.

G

H

[45] This will obviate the need for the Adjudicator to stop proceeding when he is in doubt and for party alleging a lack of jurisdiction to run to Court each time a jurisdictional challenge even of the type where it is alleged that there is a total or absolute lack of core or original jurisdiction.

I

- A There is no prejudice to the party alleging a lack of jurisdiction of the core or original jurisdiction type as that can always be raised any time and even after an Adjudication Decision has been given. (emphasis added)
- (See also: *Liew Piang Voon v. WLT Project Management Sdn Bhd* [2020] 1 LNS 1105; [2020] MLJU 1431 where it was held that the court would intervene in clear-cut cases where core jurisdiction is absent).
- B [78] In the instant case, based on the affidavit, it seems that the adjudicator has accepted and therefore permitted or at least prepared to let the adjudication proceedings to proceed and continue and to enter upon the adjudication with the defendant's representation by Messrs Gananathan Loh acting as the defendant's solicitors thus permitting them to practise as advocates in the adjudication proceedings before her in Sabah. (See: paras. 12 to 15 and exhs. "JP7", "JP8", "JP9", "JP10" and "JP11" of encl. 13 and exh. TCSB-1 of encl. 2).
- C [79] This is prohibited by the provisions of the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) for the reasons I have given.
- D [80] The objection of the plaintiff goes to the jurisdiction of the adjudicator to enter upon and to determine the claims by an agent on behalf of his principal which the agent is prohibited to represent or act by law.
- E [81] In my judgment, the payment claim, notice of adjudication and adjudication claim as required by CIPAA cannot be validly given on behalf of the defendant by the representation of Messrs Gananathan Loh in practise as defendant's advocates prohibited by the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2). It amounts to no such payment claim, notice of adjudication and adjudication claim ever given by the defendant.
- F [82] That being the case, the adjudicator can have no jurisdiction to enter upon the adjudication of the matters and determine the claim. (See: *Ideal City Development Sdn Bhd v. PWC Bina Sdn Bhd & Other Appeals* [2019] 2 CLJ 615; [2018] MLJU 1711; and *Michael J Lonsdale (Electrical) Ltd v. Bresco Electrical Services Ltd (In Liquidation) and Twintec Ltd v. Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC)).
- G [83] Any decision thus by the adjudicator would not be capable of enforcement and to require the plaintiff to contest the claims in such adjudication proceedings would be sheer waste of time and costs.
- H [84] Its interesting to note that in *Mentmore Towers Ltd And Others v. Packman Lucas Ltd* [2010] EWHC 457 (TCC), Edwards Stuart J held that:
- I [22] My conclusion is that *there is no difference in principle between the approach to be adopted by the court when considering whether or not to order a claim brought by way of litigation to be stayed on the grounds that it is being brought unreasonably and oppressively, and the approach to be adopted when considering whether or not to restrain the further pursuit of an identical claim by way of adjudication on the same grounds.* However, the application of those principles may differ

according to the circumstances. It does not follow that because a court would order the stay of a particular claim brought by way of litigation, that it would automatically restrain the pursuit of the same claim by way of adjudication. (emphasis added)

A

[85] This suggests that adjudication proceedings may be stayed on the grounds that they are brought unreasonably and oppressively.

B

[86] Further, though the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) was declared federal laws and the effect of which was to transfer the responsibility of administering the federal laws to the federal authority and to vest on the federal Parliament the power to amend or repeal such laws subject to the provisions of the Federal Constitution, it remains peculiar to the State of Sabah and effective in Sabah only. (See: *Re Datuk James Wong Kim Min*; *Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129; [1976] 2 MLJ 245).

C

[87] That means that the prohibition under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) against Messrs Gananathan Loh for practising as advocates in Sabah by their representation for the defendant in the adjudication proceedings in Sabah could not be enforced against them so long as they remained outside the State territory of Sabah.

D

[88] It can be said to be unreasonable and oppressive to let the adjudicating proceedings to proceed in the circumstances.

E

[89] It seems to me that the only effective way in the circumstances of the case to enforce the prohibition under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) against Messrs Gananathan Loh for practising as advocates in Sabah by their representation for the defendant in the adjudication proceedings in Sabah is to stay such adjudication proceedings.

F

[90] In the premises, the circumstances in the case warrant the intervention by this court to grant a stay of the adjudication proceedings to enforce the prohibition under the Advocates Ordinance Sabah 1953 (Sabah) (Cap 2) against unauthorised persons to practice or to act as advocates in Sabah by representation for a party in the adjudication proceedings in Sabah.

G

Pronouncement And Orders

[91] I therefore order that the adjudication proceedings under reference No. AIAC/D/ADJ-3479-2020 be stayed.

H

[92] I will hear submissions of the parties on costs on 15 April 2021 for which I direct the parties to file and serve their written submissions thereto on or before 15 April 2021. I also direct the plaintiff's counsel to file the bill of costs in Form 117 under O. 59 r. 7 of the Rules of Court 2012 for the court to consider the reasonable costs to be awarded if the court should decide that the plaintiff should be awarded the costs of this action.

I